RICHARD OLDHAM

IBLA 96-407 Decided November 4, 1998

Appeal from a decision of the Arizona State Director, Bureau of Land Management, affirming issuance of a notice of noncompliance for failure to comply with surface management regulations at 43 C.F.R. Subpart 3809. AZA 23514.

Affirmed as modified.

1. Mining Claims: Generally--Mining Claims: Surface Uses

BLM properly issued a notice of noncompliance in September 1995 under 43 C.F.R. § 3809.3-7 which requires a claimant to remove all structures, equipment, and other facilities and reclaim the site of operations if there has been an extended period of nonoperation and there is no apparent reason for the failure to operate. The notice challenging surface use of mill sites was appropriate where no mining or mining related operations had occurred on claims since before December 1993. Absent mining or mining related activities on the claim, no right to use the surface exists.

APPEARANCES: Gregory S. Byrd, Esq., Yuma, Arizona, for Appellant; Richard Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Richard Oldham has appealed from a May 3, 1996, Decision of the Arizona State Director, Bureau of Land Management, upholding a September 22, 1995, Notice of Noncompliance (Notice) issued by the Yuma Resource Area Manager for failure to comply with surface management regulations at 43 C.F.R. Subpart 3809 in connection with Appellant's surface use of the Jackpot #4 amended (A MC 20656), Jackpot #5 amended (A MC 20657) and Jackpot #6 amended (A MC 20658) mill sites. The mill sites are situated south of the frontage road which parallels Interstate Highway 10 on the eastern edge of the town of Quartzite, Arizona, in the N½ sec. 26, T. 4 N., R. 19 W., Gila and Salt River Meridian, La Paz County, Arizona.

The Notice charged that Appellant was in violation of 43 C.F.R. §§ 3809.1-3(d)(2), 3809.1-3(d)(3), and 3809.3-7, and directed Appellant "to remove all structures, equipment, and other facilities and reclaim the site within 30 days of receipt of this Notice." (Notice at 4.) Noting that Appellant had admitted in an onsite meeting that the mill occupying the site had not been operational since 1986, BLM asserted that 43 C.F.R. § 3809.3-7 required Appellant to reclaim the site.

The Arizona State Director upheld the Notice finding that, despite repeated promises by Appellant to cleanup the mill sites, photographs taken during a compliance inspection conducted subsequent to the date of the filing of the notice of appeal disclosed the presence of trash, debris, scrap metal, and inoperative mill equipment. (Decision at 6.)

Citing a BLM Report of Inspection performed on the mill sites after February 15, 1996, which found mill equipment on site and not operational (Decision at 5), the State Director determined that Appellant had failed to comply with an August 10, 1995, agreement with BLM promising either to have the mill operational by February 15, 1996, or reclaim the site by that date. While acknowledging that the watchman had moved off the site with his vehicles and that Appellant had contacted a millwright to have an inspection performed as required by the agreement, the State Director faulted Appellant for failing to submit a copy of the millwright's assessment to either BLM or a congressional staff member as agreed. The State Director concluded that Appellant had failed to conduct operations on the mill site pursuant to the regulations at 43 C.F.R. Subpart 3809, in such manner as to prevent unnecessary and undue degradation to the Federal lands. (Decision at 7.)

On appeal to the Board, Appellant again seeks more time within which to comply, maintaining that, pending appeal, he "is willing to reclaim his millsite and work out a plan with the Yuma Resource Manager to operate the mill during a shortened `seasonal' part of the year." (Statement of Reasons at 2.) Appellant does not dispute that he has not reclaimed the mill sites or deny that the mill is not operational. He does assert that he has cleaned all trash and miscellaneous debris from the mill sites, has disposed of all tailings, dumps, and other waste materials produced by operations of the mill, and has posted "several danger signs" on the property. He asserts that he has sold certain mill equipment in accordance with BLM's request and that all remnants of the shed have been removed. He seeks permission to file photographs "that are not readily available" documenting the state of the mill sites.

Except for the sale of the mill equipment, BLM disputes all of Appellant's claims in an August 13, 1996, Inspection Report included in its Answer. The Report is accompanied by a Declaration by David Daniels, the BLM Surface Protection Specialist, who performed the inspection. The Report contains several photographs documenting the existence of trash and debris (Exhibit A to Declaration) as well as Appellant's failure to dispose of all tailings, dumps, and other waste material produced by operation of

the mill on the sites (Photographs 8 and 9 to Exhibit A). Supplementing its Answer, BLM on October 4, 1996, filed a copy of a BLM Report of Inspection conducted August 28, 1996. That inspection revealed a "Non Operational Mill" and "no change since the last inspection on Aug. 13, 1996."

[1] The Secretary of the Interior, as manager of the public lands, is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Section 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994); see Charles S. Stoll, 137 IBLA 116, 125 (1996); Red Thunder Inc., 129 IBLA 219, 236 (1994); B.K. Lowndes, 113 IBLA 321, 325 (1990); Draco Mines, Inc., 75 IBLA 278 (1983). The surface management regulations of 43 C.F.R. Subpart 3809 were promulgated to prevent unnecessary and undue degradation of lands by mining claimants. Differential Energy, Inc., 99 IBLA 225 (1987).

Within Subpart 3809, 43 C.F.R. §§ 3809.1-3(d)(2), 3809.1-3(d)(3) and 3809.3-7 provide the applicable surface management regulations in this case. Thus, 43 C.F.R. § 3809.1-3 provides that the following standards, inter alia, govern activities conducted under a notice:

> (d)(2) All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary and undue degradation and in accordance with applicable Federal and State Laws.
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> (d)(3) At the earliest feasible time, the operator shall reclaim the area disturbed, except to the extent necessary to preserve evidence of mineralization, by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands.

The regulation at 43 C.F.R. § 3809.3-7 provides:

> All operators shall maintain the site, structures and other facilities of the operations in a safe and clean condition during any non-operating periods. All operators may be required, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment and other facilities and reclaim the site of operations, unless he/she receives permission, in writing, from the authorized officer to do otherwise.

The law is well established that a holder of an unpatented mining claim is authorized to use the surface of the claims only for purposes connected with, or reasonably incident to, the exploration and recovery of minerals therein contained. In Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985), we discussed at length the Department's authority to regulate or prohibit various surface uses on unpatented claims, concluding that the permissibility of a particular use turned on whether the use was

reasonably incident to mining or mining-related activities on the claim. 1/ This inquiry, we held, was necessary because the exclusive right of possession afforded by 30 U.S.C. § 26 (1994) is limited to uses reasonably incident to actual mining or mining-related activities. Absent mining or mining related activities, no right to use the surface exists.

In Crawford, appellants alleged substantial mining and asserted that occupancy of the claims was necessary to develop the claims. We distinguished the facts in Crawford, which required a hearing, from those cases where "in the absence of any mining activities, * * * the determination of whether occupancy of the claim is reasonably incident to mining can be made on a record developed without benefit of a fact-finding hearing." Id. at 375, 92 I.D. at 222.

In Mr. & Mrs. Michael Bosch, 119 IBLA 370, 374 (1991), we noted that if claimants could show that they are in fact the owners of the claim, "the existence of the unpatented Hard Work placer mining claim would give them the right to use the surface of the claim to the extent the use is reasonably incident to mining activities on the claim." Consistent with Crawford and the principle that it is mining or mining-related activities that gives rise to the right to possess the claim under 30 U.S.C. § 26 (1994), we recognized in Bosch that "whether or not appellants are entitled to notice and an opportunity for a hearing on the issue of whether their occupancy is reasonably incident to mining is dependent on the facts in the case." We reiterated, however, that "without the occurrence of actual mining or mining related activities, no right to use the surface arises." Id. at 374.

The State Director's Decision directing Appellant to cleanup and reclaim the site, 2/ challenges both the surface use as not reasonably incident to mining and, thus, prohibited and finds that the surface use complained of unnecessarily or unduly affects other surface resources. Because we find that the surface use is prohibited as no mining or mining related activity is occurring or has occurred for an extended period of time, we need not reach the subsidiary issue of unnecessary or undue degradation, and we modify the State Director's Decision accordingly.

The record before the Board discloses that Appellant last filed a notice of intent to conduct operations on the claims pursuant to 43 C.F.R. § 3809.1-3 in September 1988. Sixty individual inspection reports, covering the period from December 1993 to August 1996, indicated no mining or mining related activity, including milling, was occurring on the claims notwithstanding Appellant's repeated assurances that milling would start-up

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1/ Use and occupancy under the mining laws is now governed by 43 C.F.R. Subpart 3715, promulgated July 16, 1996 (61 Fed. Reg. 37125).

2/ Reclamation was required because operations had not been conducted over an extended period of time.

in the Fall of 1994 (Letter Filed with BLM Aug. 1, 1994), that the mill would be operational in January or February 1995 (Sept. 6, 1994, Letter), or within 12 months (May 15, 1995, Letter). Pursuant to the August 10, 1995, agreement, Appellant agreed that the mill was to be in operation or removed from public land and the land reclaimed by February 15, 1996. This February 15, 1996, deadline, as reflected in BLM's Report of Inspection dated August 13, 1996, passed as did the previous deadlines identified above without the commencement of mining or mining related operations occurring on the mill site claims.

Having determined that no mining or mining related activities have occurred on the mill site claims since at least 1993, as documented in the record, 3/ we find that no right to use the surface exists.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified consistent with this Decision.

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James P. Terry
Administrative Judge

I concur:

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James L. Burski
Administrative Judge

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3/ Mining or mining related activity in this case is neither "sporadic or minimal." See United States v. Doherty, 125 IBLA 296, 300 (1993). It is nonexistent.